

1. Ronan Daly Jermyn named official legal adviser to Munster Rugby

Welcome to the latest edition of Connect, the RDJ newsletter.

In these challenging economic times, sport provides a wonderful diversion and in this regard, none more so than the Munster rugby team, who we congratulate on their wonderful Heineken Cup win in Cardiff. In the past few weeks the firm were delighted to announce an innovative arrangement with

Munster Chief Executive Garrett Fitzgerald and his team run a very successful professional organisation which has been highly progressive, both on the playing front and with its commercial activities off the pitch. RDJ will advise on the business and legal issues which Munster Rugby face as they continue their progress on and off the rugby pitch.



Pictured at the announcement from left to right: Peter Stringer, John Dwyer, Managing Partner, RDJ, Garrett Fitzgerald, CEO, Munster Rugby, Doug Howlett and Tomás O'Leary.

Munster Rugby naming RDJ as their official legal advisers. This is the first agreement of its kind in Ireland between a law firm and a rugby team and we are very proud of our new association with Munster.

As avid followers of Munster for many years, the firm has a long history with the team so with this agreement we are making the connection official. Munster are recognised as world leaders in the rugby world; as their official advisers one of our first projects has been advising them on their exciting agreement with the All Blacks whose game v Munster has been confirmed for November at the new Thomond Park Stadium, being 30 years on from the famous Munster victory over New Zealand in 1978.

The opportunity to partner with a team as successful as Munster is a very exciting prospect and a great fit for both our organisations. We look forward to working with Munster at a time when the redevelopment of Thomond Park and the planned refurbishment at Musgrave Park heralds a new phase of rugby in the province.

I do hope you enjoy our newsletter and thank you for your continued support for RDJ.



John Dwyer
Managing Partner
john.dwyer@rdj.ie

in this issue...

- 1 Ronan Daly Jermyn named official legal adviser to Munster
- 2 The shifting of risk in personal injury actions
- 3 Joint ventures
- 4 Employment Law – are you compliant?
- 5 The development of mediation in the Irish legal system
- 6 Greening the built environment – be prepared and benefit

FIRM NEWS

- 7 In memory of Michael MacNamara
- 8 We've strengthened our team in Galway
- 9 Minister Billy Kelleher addresses Ronan Daly Jermyn Compliance Conference
- 10 UCC Student Law Conference 2007
- 11 RDJ Glynn supports new Masters in Law, Technology and Governance at NUI Galway
- 12 RDJ co-author a Law Society Report on Enforcement of Environmental Law in Ireland
- 13 RDJ renews its support for UCC Plus Programme
- 14 Green Issues In Property
- 15 RDJ goes red in support of Munster Rugby

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2. The shifting of risk in personal injury actions

By Carrie McDermott, solicitor, Litigation and Dispute Resolution

In any litigation matter the general rule applicable is that costs follow the event. Once the wrong is proved, the wronged party is entitled to compensation from the wrongdoer together with an Order that all his reasonable legal costs incurred in respect of litigating his loss will be discharged. While the Courts have discretion to interfere with this general rule, it is applied in most cases.

In recent years, legislation has dramatically eroded these basic principles.

1. Personal Injuries Assessment Board Act 2003

This established the Personal Injury Assessment Board (PIAB) to assess personal injury claims. The Board is not concerned with issues of liability; all assessments are made solely to assess compensation without reference to the blameworthiness of the parties involved. The Board has no jurisdiction to award costs to either party and any assessment that is made is done so without any reference to costs. Where an assessment is rejected by either party, the Claimant is entitled to proceed to litigation. The 2003 Act failed to address the issue of whether legal costs associated with the making of the PIAB application could be awarded. Indeed many matters proceeded to taxation on this point alone, County Registrars in different areas of the country took different views. The Act did provide that costs would be allowable in cases concerning infants, where assessments had to be approved by the Courts, and cases

involving vulnerable claimants. The Act fails to define what a 'vulnerable' claimant is and there is much debate on this point.

2. The Civil Liability and Courts Act 2004

This Act obliges the Plaintiff to a personal injuries action to serve the Defendant with a letter of claim, setting out the material facts together with the particulars of the Plaintiff's claim. This letter must be served on the Defendant within two months of the cause of action or as soon as practicable thereafter. Failure to serve a letter of claim will allow the Court to "draw inferences" and if the interests of justice so require, to make no order in respect of costs or to decrease any order for costs made in favour of the Plaintiff.

Section 17 of the Act places a mandatory obligation on all parties to a personal injuries action to make formal offers of settlement to each other. The Section provides that the Defendant may make a nil offer, where liability is fully in issue, but nevertheless a formal offer stating this must be made. Both parties are obliged to serve this on each other within two weeks of the service of the Notice of Trial by the Plaintiff. The Judge, after delivering judgement in a personal injuries matter "shall" have regard to the terms of the Section 17 offer when deciding the issue of costs. The Judge is also entitled to have regard to the "reasonableness of the conduct of the parties" when deciding this issue. There is no definition as to the meaning of this phrase as yet.

Where a Plaintiff fails to beat the Section 17 offer, the Defendant is certainly entitled to argue that no costs should be allowable from the date of the offer and to seek the costs of the Defence.

3. The Personal Injury Assessment Board (Amendment) Act 2007

This Act has further muddied the waters. The Act provides that where a Respondent accepts the PIAB assessment, but the Claimant rejects it and proceeds to litigate, if the amount of damages awarded on foot of proceedings or accepted in settlement of

the proceedings, does "not" exceed the amount of the PIAB assessment, then the Court, must order the Claimant to pay his own costs and may at its discretion order the Claimant to pay all or a portion of the Defence costs.

To be effective, the Section 17 formal offer must be equal to the amount of the PIAB assessment to defeat the Plaintiff's claim for costs and to allow the Defendant to argue that the Plaintiff should be liable to pay the Defence costs. Also when relying on the PIAB award, there can be no lodgement or tender.

The Act has also clarified the position in respect of legal fees incurred by the Plaintiff in relation to the PIAB process. Section 51(b) provides that the legal costs in connection with PIAB applications are not recoverable. The Claimant must discharge these costs out of any assessment, settlement or award received.

These changes will transfer further risk to the Claimant. Prior to the introduction of the PIAB process, it was heralded to be the beginning of a new simple system where legal advice was unnecessary, being described as a lawyer free zone! It is now a minefield of legal rules which will push nearly all Claimants back into the hands of the lawyer. A welcome change for Insurers; a change to be viewed with caution by Claimants.

Carrie McDermott can be contacted at carrie.mcdermott@rdj.ie

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3. Joint ventures

By David Naughton, solicitor, Corporate and Commercial, RDJ Glynn

Joint ventures have become increasingly popular as a method by which companies undertake their business activities and projects. A major factor has been the size of transactions and projects, which often require commitments on a scale beyond the resources of individual companies. For example, Bank of Scotland Ireland recently announced it is seeking opportunities to undertake joint ventures with Irish property developers and operators of a range of property-related businesses, including chains of hotels, nursing homes and leisure facilities.

Whatever the rationale, a joint venture inevitably involves a loss of control and flexibility and exposure to the commercial strains which are an inherent part of a joint venture relationship. With this in mind, the challenge is to create a structure which not only meets the technical, operational, financial, accounting, regulatory, legal and tax requirements of the venture but also captures the underlying commercial objectives of the individual participants. The following are some legal and transactional issues to be considered at the outset of discussions regarding a proposed joint venture.

1. Initial steps

Has a confidentiality agreement or information exchange agreement been put in place during preliminary discussions? Is any of the parties a publicly quoted company with public announcement obligations or stock exchange requirements for shareholder approval relating to the venture? What material authorisations, consents, licences or other conditions precedent will be required for the joint venture to commence?

2. Structure of the joint venture

In almost all joint ventures, the first choice to be made is whether or not a separate legal entity will be established as a vehicle for the joint venture. As far as Irish law is concerned, it is currently a question of forming a company (almost certainly a limited liability company) under the Companies Acts or proceeding with an unincorporated structure. In the latter case, the arrangement will either constitute a

legal partnership under the Partnership Act 1890 (or a limited partnership) or a non-statutory contractual arrangement between the participants.

3. Local law issues

Consider issues raised by local laws of the jurisdiction in which the joint venture will be principally located or undertake business. For example, what are the registration requirements? Is inward foreign investment reviewed by any governmental authority? What language will govern the joint venture relationship?

4. Regulatory matters

Identification of the regulatory issues and filings/consents required will be an important part of the initial analysis. Will the joint venture result in the concentration of a significant market share in any particular market or jurisdiction? Do the EU Merger Regulations apply? Should any approvals of regulatory authorities be made conditions precedent of the establishment of the joint venture?

5. Tax

Tax considerations may play a major part in structuring the joint venture and, if so, will require detailed attention and planning. Are there capital gains on the contribution of assets/shares to the joint venture? Are there capital allowances/balancing charges on the transfer of assets? Is there a need to transfer tax losses? In the case of an international joint venture, will the structure be affected by the need for efficient repatriation of profits, thin capitalisation or transfer pricing?

6. Employee issues

Employment issues should be considered early. For example, is there a transfer of a business? Will the Acquired Rights Directive/Transfer of Undertakings Regulations apply? Will employees be seconded to the joint venture or employed by the joint venture? Are employees members of an existing pension scheme? Will there be a need for a new joint venture pension scheme? Will there be a need to harmonise employment terms and conditions of the two parties within the joint venture?

7. Intellectual property

The principal intellectual property rights (IPR) issues need to be identified early. Will material technology be provided by the parties to the joint venture? Is it protected by IPR? Will competition laws apply to the terms relating to IPR? Consideration may need to be given to the possible application of the Technology Transfer Block Exemption? Will trade marks (including "house marks") of the parents be licensed to the joint venture for its use - including in its name/logo?

8. Property and related services

Property and related issues to be considered at the outset include whether any transitional arrangements are necessary to support the joint venture in respect of services, property-related facilities, IT/communication systems, accounting and other professional support? Is there a need for environmental audits? Is there a need for the allocation of indemnities regarding potential environmental liabilities attributable to pre-completion circumstances?

From the legal and transactional issues raised above, it can be seen that any proposed joint venture is complex. Each case must be carefully considered by reference to its own facts so that all relevant issues are addressed, so early planning is important.

David Naughton is a member of our Corporate and Commercial team in our Galway office, RDJ Glynn. He can be contacted at david.naughton@rdj.ie

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4. Employment Law – are you compliant?

By Jennifer Cashman, Partner, Employment

The long awaited Employment Law Compliance Bill, 2008, (“the Bill”), was finally published on 18 March last by Michael Martin, Minister for Enterprise, Trade and Employment and Billy Kelleher, TD, Minister for Labour Affairs. At the time of publication, Mr Martin stated,

“ This is the most significant single piece of legislation introduced in the employment rights area in recent years. It is a comprehensive package and a firm indication of this government’s commitment to the principles of social partnership ... compliance with all aspects of employment law will be strictly enforced, including in the employment permits area national minimum wage, registered employment agreements and protection of young persons ” in employment.

The Bill is extremely important from the employer’s perspective and, once passed into law, will result in a complete overhaul of our employment legislation. The Bill places the National Employment Rights Authority (NERA) on a statutory footing and strengthens powers in the area of labour inspection, including allowing the Director of NERA to take evidence on oath and increasing the number of Labour inspectors whose purpose is to compel compliance.

The Bill further provides for greater penalties for offences arising under various pieces of employment legislation and in most cases up to €5,000 and/or 12 months imprisonment for summary offences and

€250,000 and/or three years imprisonment for indictable offences.

Employers will be obliged to display a notice containing certain information in a prominent position in the workplace. The notice must be in a form easily understood by their employees, therefore, it may need to be translated into other languages. The notice must contain the following information:

- (a) employees’ entitlements under employment legislation;
- (b) complaints procedures concerning entitlements under employment legislation;
- (c) the contact details of the Director of NERA to assist employees if they wish to make general enquiries regarding their entitlements under employment legislation and to assist employees who wish to communicate information in relation to breaches of employment legislation to the Director of NERA.

The Bill provides that employers must keep the following records:

- (a) a copy of each employee’s contract of employment;
- (b) records to demonstrate compliance with any relevant Employment Regulation Order or Registered Employment Agreement;
- (c) particulars of wages and deductions from wages of employees;
- (d) records to show the provisions of the Protection of Young Persons (Employment) Act 1996 are being complied with;
- (e) records to show that the provisions of the Organisation of Working Time Act, 1997 are being complied with;
- (f) Records to show compliance with the National Minimum Wage Act, 2000;
- (g) Records of the amount of Carer’s leave taken by each employee under the Carer’s Leave Act, 2001;
- (h) Records required under the Redundancy Payments Act, 1967, the Protection of Employment Act, 1977 and the Protection of Employees (Employers’ Insolvency) Act, 1984.

In this new era of employment compliance, and in the wake of the publication of the Bill, what are the practical implications for employers and how will this new compliance regime impact on a day to day basis on employers’ businesses?

First and foremost, the compliance obligations mean that employers are at increased risk of spot checks from Labour Inspectors who will seek access to all documentation and records required under the legislation. Therefore, employers must ensure they have in place all of the necessary documentation, such as contracts and policies and procedures together with all records. Therefore, all employers should conduct a HR audit of their organisation to ensure that they are in compliance with their obligations. If employers are not fully compliant, then they should take all steps necessary to make themselves fully compliant.

For organisations without employment contracts already in place, these should be put in place immediately. If your employees refuse to sign a written contract of employment where none existed previously, then at the very least you must issue them with a written statement of the main terms and conditions of their employment (which they are not required to sign but which must accurately reflect their actual terms and conditions and must include at least all of the information specified in the legislation) together with all appropriate policies and procedures.

Employers must also ensure that they are paying their employees correctly – consideration in this regard must be given to the National Minimum Wage legislation and the Organisation of Working Time legislation.

The publication of the Bill is a good opportunity for all employers to audit their employment practices and procedures and ensure they are fully compliant.

Jennifer Cashman can be contacted at jennifer.cashman@rdj.ie



5. The development of mediation in the Irish legal system

By Jamie Olden, solicitor, Litigation and Dispute Resolution

The recent Pat Kenny case highlighted the increased importance of mediation in the Irish legal system and shows the willingness of both the Courts and legal advisers to use it as a tool to resolve disputes.

Mediation has been in use in other countries, avoiding lengthy and expensive trials, for a number of years. Mediation is not suitable for all disputes but should be considered as an option in all commercial disputes. Although a case may not settle at mediation, an early mediation focuses both the clients and legal advisers on the dispute and highlights the strengths and weaknesses of each party position far sooner than would normally be the case. The most recent statistics indicate that over 70% of cases referred to mediation either settle on the day or soon afterwards.

Mediation is a flexible process conducted confidentially in which a neutral person, with no personal stake in the dispute, actively assists parties in working towards a negotiated settlement. The parties are ultimately in control of the decision to settle and the terms of the resolution (there is no judgment).

The main benefits of mediation include:

- a probable reduction in costs if a mediation takes place early;
- a win win situation for all parties in that no decision is forced on the individuals;
- all parties feel that they have had their "day in court";
- and there is a final and certain outcome to a mediation.

Another benefit of mediation is that one can, through negotiation, achieve an outcome that you cannot get from a court and it provides greater scope for allowing a

continuing business relationship between the parties once a dispute is resolved.

As most people know Pat Kenny and his wife were engaged in a dispute with their neighbours, the Charltons, relating to a plot of land in Dalkey, County Dublin. Both parties were claiming ownership of the land. The Charltons claimed ownership on foot of title they acquired in the 1970's, the Kennys' argued that since 1991 they had occupied the land and turned it into a nature reserve. On foot of this they claimed they had established entitlement to the land through adverse possession (if you have 12 years uncontested possession of land, you can claim it as yours). The case had been before the Court for a number of years and significant costs had been incurred.

The case opened before Mrs. Justice Mary Clarke in Dublin. It was expected that the case would take four weeks to be heard (a conservative estimate indicated that it was going to cost each party approximately €15,000 per day during the course of the trial). After the opening submissions from the Charltons, and before the parties gave evidence, Ms Justice Maureen Harding Clark suggested that it would be in both families' interest to consider mediation. The parties agreed to mediation and were given the weekend to progress the matter. This was an unprecedented step by the Court. Although the new Commercial Court (a division of the High Court which hears cases where the amount in dispute is over €1,000,000) has provided for mediation in its rules, it is highly unusual in a case outside of the Commercial Court for mediation to be suggested. Clearly the Irish judiciary has decided that mediation is

useful in all disputes and either party in a dispute who rejects mediation could face adverse findings at some future time from the Court.

Mr. Rory Brady SC was appointed mediator. Both parties met over the weekend and the case was settled by the following Monday, with Mr. Kenny agreeing to purchase the land. This shows two things: firstly that mediation works; secondly that if mediation had occurred earlier the matter could have been resolved with a significant reduction in costs.

Another reason to agree to mediation is that because of a number of judgments in the UK, parties who refuse to participate in mediation can ultimately be responsible for costs of the other side even in the event that they ultimately win the case. This would be contrary to the norm where costs follow the event i.e. if you lose a case you pay both sides costs.

It is important that whenever you as a party are engaged in litigation, that mediation is considered at some stage, if only to be discounted. Mediation is a valid option in most commercial disputes and most of the legal firms in Ireland who deal with commercial disputes, including this firm, have participated in a large number of mediations over the past two years and we believe it is going to become more relevant and popular in future years.

Jamie Olden can be contacted at jamie.older@rdj.ie

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6. Greening the built environment - be prepared and benefit

By Aoife Shields, solicitor, Environmental and Planning

The main energy performance requirements for buildings

The main driver for more energy efficiency of buildings is the EU Energy Performance of Buildings Directive (“EPBD”). The EPBD obligations are largely implemented in Ireland by the Building Regulations 2005–2007. The timetable for compliance with the EPBD obligations is as follows:

1 Jul 2006	Energy performance requirements in the Building Regulations SI 873/2005 (see TGD 2006) must be complied with when <ul style="list-style-type: none"> • Constructing non-domestic buildings • Carrying out works /or materially changing the use of an existing non-domestic building.
1 Jan 2007	Feasibility of installing an alternative renewable energy system in large buildings (+1000m ²) must be considered at design stage and the results of the assessment incorporated in a design report.
1 Jan 2007	Building Energy Rating certificates (“BER”) are required on construction of all new domestic buildings. However, BER is not required where planning has been applied for on or before 31 December 2006 and where the external walls are erected by 30 June 2008.
1 Jan 2008	Owners of air conditioning systems with an effective rated output of more than 12 Kw. must arrange for the inspection, assessment, maintenance and service these systems.
31 Mar 2008	Oil and Gas fired boilers installed in dwellings must meet minimum seasonal net efficiency of 86%.
1 Jul 2008	Energy performance requirements set out in the Building Regulations SI 854/2007 (see TGD 2007) must be complied with when <ul style="list-style-type: none"> • Constructing a domestic building (unless planning is applied for on or before 30 June 2008 and external walls built by 30 June 2009) • Carrying out works on an existing domestic building.
1 Jul 2008	BER certs required on the construction of non-domestic buildings. However, BER is not required where planning has been applied for on or before 30 June 2008 and where the external walls of the building are erected by 30 June 2010, unless it is the second or subsequent sale or letting.
1 Jan 2009	BER certs required for the sale or letting of existing domestic and non-domestic buildings.

The future trends

Looking at trends in the UK and EU may help in the formation of a view as to what the likely requirements for green buildings will be in the future. Ireland frequently follows English practice in fields such as this, and is required to follow EU initiative when translated into legal requirements.

1. Carbon Reduction Commitment for mainstream businesses

From 2010 the UK government will introduce a mandatory emissions trading scheme for mainstream businesses. (“Carbon Reduction Commitment”). It will require non-energy intensive organisations, such as large offices, hotels and retailers with electricity bills in excess of £500,000 to obtain allowances to emit carbon.

For now in Ireland, the Emissions Trading Scheme only covers energy intensive industry (e.g. large manufacturing plants, extractive industry). The scheme may be

extended further to include all types of business and therefore impact on the property industry.

2. Sustainability Certificates- Residential Properties

In England, from May 2008, sellers of new homes must give purchasers information on the sustainability of the home by providing either a:

- (a) Sustainability Certificate: rating environmental performance of the home; or
- (b) Nil-rating Certificate: saying that the home is designed to meet the requirements of the current building regulations but not the sustainability standards set out in the UK Code for Sustainable Homes 2008.

Like the BER system accredited assessors carry out the sustainability assessment of a home. The assessment is carried out in accordance with the Code for Sustainable Homes using the rating system set out in the code.

Water efficiency performance requirements for buildings

The UK is rolling out mandatory water efficiency performance requirements for buildings with a view to cutting water use by 20%. Recently, the European Commission tabled a proposal to develop a Directive on water efficiency performance requirements for buildings.

Impact on the property industry

Green building requirements, current and future, will impact on those who own, occupy or invest in property. For instance:

1. Breach of the EPBD requirements is an offence, may damage reputation and affect ability to obtain funding for a project.
2. The sale or letting of a property will require a BER certificate.
3. Adherence to high energy efficiency standards in buildings increases BER certificate rating, making property more marketable.
4. Government will continue to increase energy efficiency requirements and may in time impose other environmental performance requirements for buildings.
5. Sustainability certificates may be required in the future when selling or letting property.
6. If you occupy a property you may in the future be required to have an allowance to emit carbon.

What can you do?

1. Prepare now - know current requirements and when they are coming on stream.
2. Plan ahead - future requirements are likely to impact on investment decisions taken now, it is best to factor them in now.
3. Review your contracts – consider “greening” leases and construction contracts.

Aoife Shields can be contacted at aofie.shields@rdj.ie

Footnotes

1. Technical Guidance Document, Department Environment, Heritage & Local Government
2. The sustainability standards the home is assessed against energy efficiency and CO₂ emissions; water efficiency; sustainable building material; waste management; ecology; health and well-being. (See Code for Sustainable Homes 2008)

Firm news

7. In memory of Michael MacNamara



This edition of Connect is dedicated to the memory of Michael MacNamara, who recently passed away. Michael was a Partner in our Galway office, RDJ Glynn, and had spent over 30 years of his professional life with WB Glynn Solicitors.

Michael was a highly respected solicitor and a loyal colleague and friend. Apart from his very successful professional life, Michael had a keen interest in antiques and the arts and was a very well known and well liked figure in Galway.

He will be sadly missed by all and our sympathies are with his wife Phyllis and his son James.

8. We've strengthened our team in Galway

As part of our commitment to expand our commercial law offering to businesses in the West, we are delighted to announce the appointments of David Naughton and JP Gilmartin to our Galway office.

David and JP join us as corporate and commercial lawyers with broad-ranging experience from large commercial firms in Dublin on general corporate law and commercial agreements.

Ciara Lennon and David McCarroll have also joined the Galway team. Ciara joins the Commercial Property team and David is a specialist in Employment Law.

9. Minister Billy Kelleher addresses Ronan Daly Jermyn's Compliance Conference

Minister for Labour Affairs, Billy Kelleher, TD, gave the opening address on the 18 April 2008, at our conference entitled 'Employment Law – Are you compliant? The conference was held to assist employers familiarise themselves with their employment law obligations.

Pictured at the conference (from l to r): Hugh Morley, Morley and Associates, Jennifer Cashman, RDJ's employment law team, Minister for Labour Affairs, Billy Kelleher TD and Alice Crowley from RDJ's employment law team.



10. UCC Student Law Conference 2007



Pictured from left to right are: Dr Aine Ryle, Dr Fergus Ryan, Rosemary Horgan, Partner, RDJ, Prof. Caroline Fennell, Dean of Law, UCC and Mike Cahill, UCC.

11. RDJ Glynn supports new Masters in Law, Technology and Governance at NUI Galway

NUI Galway is launching a new Masters programme, the LLM in Law, Technology and Governance. This new postgraduate course offers students an innovative and internationally focused programme dealing with law, commercial activity, science and technology. The scholarship for the course has been funded by our Galway office. The programme is full time for twelve months and applicants must hold a degree in law, or an interdisciplinary degree which includes a substantial law component.

Firm news

12. RDJ co-author a Law Society Report on Enforcement of Environmental Law in Ireland

Finola McCarthy and Aoife Shields from our Environmental Law Unit co-authored, along with Deborah Spence from Arthur Cox and Owen McIntyre from UCC, a Law Society Report on Enforcement of Environmental Law in Ireland. The report was launched by Minister John Gormley TD on Thursday 22nd April 2008 in the Blue Room, Law Society, Blackhall Place.



Pictured at the launch from l to r: Aoife Shields, solicitor, RDJ, Finola McCarthy, Partner, RDJ, Minister for the Environment, Heritage and Local Government, John Gormley TD, Deborah Spence, Arthur Cox, Owen McIntyre, UCC and Alma Clissman, Law Reform Commission.

13. RDJ renews its support for UCC Plus Programme

RDJ recently announced its continued support for University College Cork's UCC Plus Programme. We began supporting the Programme back in 2003 for a five year period and have now agreed we will continue to provide bursaries for a number of students to complete their undergraduate law studies at UCC for another five years.

The UCC Plus Programme (formerly known as the UCC Access Programme) provides support for students from a disadvantaged background to enable them to pursue third level education. Through the programme the university has devised a means of working with these young people while still in secondary school, so that they are encouraged to progress to third level education. With 320 students currently on the Programme, it is expected to grow significantly over the next number of years.



14. Green Issues In Property

RDJ held a breakfast briefing on the 3 April 2008, entitled Green Issues in Property. The briefing highlighted the current and future environmental issues surrounding sustainable building. The speakers offered advice on current best practice to ensure those involved in property development adopt a green mentality now to save unnecessary expenditure in the long run.

Pictured are the speakers (from l to r): Finola McCarthy, Partner, Pat Ahern, Partner and Aoife Shields from RDJ's Construction and Environmental Law Team.

15. RDJ goes red in support of Munster Rugby

